

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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| _____ |) | |
| In the Matter of |) | |
| |) | |
| Empowering Consumers to Prevent and Detect |) | CG Docket No. 11-116 |
| Billing for Unauthorized Charges (“Cramming”) |) | |
| |) | |
| Consumer Information and Disclosure |) | CG Docket No. 09-158 |
| |) | |
| Truth-in-Billing and Billing Format |) | CC Docket No. 98-170 |
| _____ |) | |

COMMENTS OF INTERNET SEARCHES GROUP

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COMMENTS OF INTERNET SEARCHES GROUP, INC.

The Internet Searches Group, Inc. (“ISG”), by and through its attorneys, submits these comments in response to the Federal Communications Commission’s (“Commission’s”) Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceedings.¹ The bulk of the NPRM discusses proposals to improve the information available on telephone bills and to clarify procedures for the offering of blocking of third-party charges. ISG does not oppose these proposals in concept, provided they can be implemented without increasing the cost of LEC billing and that customers are able to freely choose whether to block third party charges. However, ISG is troubled by suggestions that go beyond the format of telephone bills and intrude upon the terms of third-party billing services. There are several proposals under consideration in the Commission’s NPRM that raise this potential issue, but none is more concerning to ISG than the suggestion that the Commission could mandate LEC screening that subjects third-party service providers to non-governmental adjudication of the lawfulness of their services.

¹ See *Empowering Consumers to Prevent and Detect Billing for Unauthorized Charges (“Cramming”)*, CG Docket No. 11-116, Notice of Proposed Rulemaking, FCC 11-106 (rel. July. 12, 2011) (“NPRM”).

ISG is wholly committed to the Commission's goal in this proceeding – to prevent billing of unauthorized charges to consumers, a practice commonly referred to as “cramming.” For decades the Commission has relied upon market forces to discipline telephone company billing for third party charges. The industry developed a voluntary code of billing guidelines that ensure services are knowingly authorized and that enable billing agents to quickly identify and root out companies that violate the prescribed standards of conduct. These guidelines continue to be improved, with telephone companies and third-party billing agents introducing a variety of new measures in the past year alone. ISG supports and adheres to these guidelines in its services.

Unfortunately, the NPRM upsets this balanced approach and intrudes upon private transactions that the Commission has determined to be outside its jurisdiction. Many of the NPRM's proposals would impose substantial burdens on telephone carriers, third-party Billing Agents and Service Providers without achieving the anticipated benefits for telephone customers. In addition, some proposals raise important constitutional concerns. For these reasons, ISG opposes the NPRM in part.

I. THIRD-PARTY LEC BILLING IS A LOW-COST AND CONVENIENT BILLING METHOD FOR SMALL BUSINESS CUSTOMERS

ISG relies upon LEC billing services as a low-cost way to provide services to its small business customers. ISG verifies each and every order submitted, and is committed to the Commission's goal of ensuring that all services billed on local telephone bills are knowingly and fully authorized by the billed customer. ISG provides enhanced services that assist small and medium sized businesses to increase their online marketing presence. This includes search engine optimization and assisting business customers to submit their listings with the major Internet search engines. The availability of billing through the customer's existing local telephone invoice is a key convenience for ISG's customers, which typically do not have

dedicated accounts payable departments and employees. Customers' access to these affordable services is facilitated by an arrangement to invoice charges through each customer's local telephone company, thereby reducing the number of invoices to be managed each month.

Indeed, the convenience of a single bill is becoming increasingly important to consumers and competition. Many providers bill a "triple play" of services on one invoice, combining regulated telephone services with non-telephony products such as Internet access and television programming. Carriers also bill for affiliated service providers' services such as voicemail, inside wire maintenance, alarm monitoring and similar services. The availability of third-party billing for these services provides an important vehicle for unaffiliated providers to compete with the cost and convenience telephone companies offer to their own subscribers. More recently, newer forms of third-party billing are becoming accepted, such as "text to give" campaigns, games, ringtones and apps downloads. Consequently, the convenience of third party billing on telephone bills is a critical benefit for consumers and the market as a whole. ISG thus has a considerable interest in ensuring that the Commission preserves third-party billing as a viable option.

II. THE COMMISSION DOES NOT HAVE AUTHORITY UNDER THE COMMUNICATIONS ACT TO REGULATE BILLING AND COLLECTION SERVICES

While the Commission's desire to ensure that charges on telephone bills are authorized is laudable, the Commission must be mindful that its authority over billing services is limited.

A. The Commission Has Determined That It Does Not Have Title II Authority to Regulate Billing and Collection Services

Title II of the Communications Act only permits the Commission to regulate interstate communications offered on a common carrier basis. It does *not* give the Commission authority

to regulate billing and collection services subject to private contracts between carriers and third-party service providers.

In 1986, the Commission specifically determined that “carrier billing or collection for the offering of another unaffiliated carrier is not a communication service for purposes of Title II of the Communications Act.”² In making this finding, the Commission concluded that “[b]illing and collection service does not employ wire or radio facilities and does not allow customers of the service...to ‘communicate or transmit intelligence of their own design and choosing.’”³ The Commission correctly found that billing and collection is a “financial and administrative service” that is “not subject to regulation under Title II of the Act.”⁴ Accordingly, the Commission in 1986 deregulated telephone company billing and collection services. LECs, therefore, no longer were required to offer billing and collection, and were given discretion to determine the terms and conditions upon which they would offer the service.

The Commission again confirmed its lack of authority more than a decade later. At that time, at the urging of the Commission, the telecommunications industry developed new anti-cramming guidelines.⁵ The voluntary guidelines include procedures for comprehensive screening of products being charged to local telephone bills, LEC scrutiny of service providers, verification of end user approval of services being charged to their bills, customer dispute resolution procedures and other protections for consumers. With respect to verification of

² *Billing and Collection Services*, Report and Order, 59 Rad. Reg. 2d 1007, ¶ 31 (1986) (“Billing and Collection Services Order”); *Billing and Collection Services (Reconsideration)*, Memorandum Opinion and Order, 1 FCC Rcd 445 (1986).

³ Billing and Collection Services Order, ¶ 32 (quoting *Nat’l Ass’n of Regulatory Util. Com’rs v. FCC*, 525 F.2d 630, 641 n.58 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976) (quoting *Indus. Radiolocation Serv.*, Docket No. 16106, 5 FCC 2d 197, 202 (1966)).

⁴ Billing and Collection Services Order, ¶¶ 32, 34.

⁵ *FCC and Industry Announce Best Practices Guidelines to Protect Consumers from Cramming*, FCC News Release (rel. July 22, 1998) (“News Release”).

orders, the voluntary guidelines affirm that it is the service provider's responsibility to inform end users of all rates, terms and conditions of service and to obtain and retain the necessary end user authorization.⁶

Importantly, the Commission deliberately chose not to implement mandatory obligations, much like it did last week in connection with the "bill shock" proposal. In the News Release announcing the voluntary industry guidelines, the Commission noted that the guidelines had been developed quickly and "had traditional regulatory rulemaking processes been used, the project would have taken much longer to complete."⁷ The Commission's role, the News Release continued, is to educate consumers and to help them understand their telephone bills (the latter role ultimately leading to the *Truth-in-Billing* rules).⁸ The Commission did not express a role in regulating the terms of the billing relationship between LECs and third party providers.

Finally, one distinction is important to understanding the Commission's limited jurisdiction. The NPRM does not address a telephone company's billing for its own services. The Commission recognized in 1986 that "[b]illing and collection for a carrier's own communications offering is an incidental part of the provision of a communication service."⁹ The Commission surely can regulate how a telecommunications carrier bills for its own services. However, this proceeding concerns billing and collection for unaffiliated entities. Such billing services "would not be incidental to any service offered by the local exchange carrier, but would be a service offered to another carrier."¹⁰

⁶ Anti-Cramming Best Practice Guidelines, July 22, 1998, at 14 (available at http://transition.fcc.gov/Bureaus/Common_Carrier/Other/cramming/cramming.pdf).

⁷ See News Release at 1.

⁸ *Id.* at 1-2.

⁹ Billing and Collection Services Order, ¶¶ 2-3.

¹⁰ *Id.*

The NPRM asserts that the Commission's authority to adopt cramming rules lies in Section 201(b) of the Act, which requires that "all 'practices...in connection with' common carrier services be 'just and reasonable.'"¹¹ However, there have been no changes to Section 201(b) of the Act since 1986 to alter the Commission's well-reasoned conclusion that billing and collection services are not subject to the its Title II authority.

B. The Commission Does Not Have Title I Ancillary Authority to Regulate Third Party Billing and Collection Services

The Commission also seeks comment on its ability to regulate cramming under its Title I ancillary authority.¹² The Commission restates the two-part test to exercise its Title I jurisdiction pursuant to last year's *Comcast* decision, but does not provide an analysis of those factors.¹³

The Commission's assertion in the NPRM of ancillary authority to regulate third party billing and collection services fails both parts of the two-part test for exercise of such jurisdiction. First, the Commission's general jurisdictional grant under Title I does not "cover the regulated subject..." of third-party billing services.¹⁴ In the *Comcast* decision, Comcast conceded that this first test was satisfied because its Internet service qualified as a "interstate and foreign communication by wire."¹⁵ In the instant case, however, billing and collections is not a communication service because, as the Commission previously determined, it "does not employ

¹¹ NPRM, ¶ 83.

¹² See NPRM, ¶ 85.

¹³ *Id.* (citing *Comcast Corp. v. FCC*, 600 F.3d 642, 646 (D.C. Cir. 2010)). The two-part test discussed further below states that the Commission "may exercise ancillary jurisdiction only when two conditions are satisfied: (1) the Commission's general jurisdictional grant under Title I [of the Communications Act] covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities." *Comcast*, 600 F.3d at 646 (citing *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005)).

¹⁴ NPRM, ¶ 85.

¹⁵ *Comcast*, 600 F.3d at 646.

wire or radio facilities.”¹⁶ Therefore, the billing and collection arrangements between local exchange carriers and carrier or non-carrier third-party service providers are not a regulated subject pursuant to Title I of the Act and the Commission’s assertion of Title I ancillary authority to regulate cramming fails the first part of the two-part *Comcast* test.

Second, even if third party billing services were within the subject matter of Title I, the proposals to regulate the content of those services are not “reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.”¹⁷ In other words, in order for an action to fall within the Commission’s ancillary authority, the action must be ancillary to some authority that the Commission does possess. For example, the regulation of cable TV services (prior to the 1984 Cable Act) was found to be ancillary to the Commission’s regulation of broadcast TV services, which clearly were within the Commission’s jurisdiction.¹⁸

Here, there is no connection between the substantive terms of third party billing and any area of the Commission’s authority. The Commission has not established a record finding that its proposed regulation of the third party billing relationship is ancillary to any statutorily mandated responsibility. Oddly, the NPRM only cites to the Billing and Collection Services Order, in which the Commission determined *not* to exercise its ancillary jurisdiction because “no statutory purpose would be served by continuing to regulate billing and collection service....”¹⁹

¹⁶ Billing and Collection Services Order, ¶ 32

¹⁷ NPRM, ¶ 85. In the Billing and Collection Services Order, the Commission recognized that “[t]he exercise of ancillary jurisdiction requires a record finding that such regulation would ‘be directed at protecting or promoting a statutory purpose.’” Billing and Collection Services Order, ¶ 37 citing *Second Computer Inquiry*, 77 FCC 2d 384, 433 (1979), *aff’d on reconsideration*, 84 FCC 2d 50, 92093 (1980), 88 FCC 2d 512 (1981), *aff’d sub nom. CCIA v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub nom. Louisiana P.S.C. v. United States*, 461 U.S. 938 (1983)).

¹⁸ *United States v. Southwestern Cable*, 392 U.S. 157 (1968).

¹⁹ Billing and Collection Services Order, ¶ 37.

This statement confirms that the Commission may not reach beyond the form and content of bills to regulate the third party billing relationship itself.

Put simply, the Commission does not have the authority to regulate third party billing services as it proposed in to do in the NPRM. The Commission's own precedent establishes that billing and collection services are not communications common carriage subject to its Title II jurisdiction. Further, the Commission has not met either part of the test from *Comcast* to exercise Title I jurisdiction over the services.

III. REQUIRING CARRIER ADJUDICATION OF VENDOR LEGAL COMPLIANCE WOULD VIOLATE DUE PROCESS REQUIREMENTS

ISG asserts that the Commission's limited jurisdiction pursuant to the Communications Act to regulate billing and collection services is a fatal flaw for many of the proposals in the NPRM. However, the specific due diligence proposal also raises significant constitutional concerns. The NPRM seeks comment regarding whether the Commission should "require carriers, before contracting or agreeing with a third-party vendor to place its charges on customer telephone bills, to screen each such vendor to ensure that it has operated and will continue to operate in compliance with all relevant state and federal laws."²⁰ This proposal has many sub-components, suggesting that carriers should monitor complaint thresholds, refunds, unbillable charges, uncollectible charges and the like.²¹ The proposal also apparently contemplates adjudications of the relationships between various companies, their ownership, or the participation in companies by particular individuals.²²

At the outset, one component of this proposed test is impossible. There is no way for a carrier to determine that a vendor will or will not "continue to operate in compliance" with

²⁰ NPRM, ¶ 64.

²¹ *Id.*

²² *Id.*, ¶ 65.

regulatory requirements. Any conclusion rendered by a telephone carrier about future conduct would be subjective at best, and pure speculation at worst. Such a proposal would subject third party service providers to the unbridled whim of telephone carriers, under cover provided by the Commission no less.

More fundamentally, the proposed screening of past conduct is unconstitutional. Under the proposal, telephone carriers would be required to make an independent determination whether a third party service provider complies with “all relevant state and federal laws.” Telephone carriers cannot be placed in the position of state and federal law enforcement authorities. Carriers are not equipped to make an independent adjudicative finding regarding whether or not a third-party vendor has violated any state or federal law, nor may third parties be made subject to such private adjudications. The billing carrier cannot substitute for governmental agencies, with their requisite procedural and constitutional due process protections.

The screening procedures that the NPRM suggests could constitute an uncompensated “taking” without due process under the Fifth Amendment of the U.S. Constitution. Contracts are protected property interests under the Fifth Amendment.²³ If a billing carrier were to deny billing (or reverse charges billed) based on the Commission’s requirements, such action would constitute a “taking” of Service Providers’ contractual rights without due process of law. The Commission cannot substitute private action for government action in taking amounts owed to the Service Provider – even where the subscriber has willingly paid the charges invoiced.

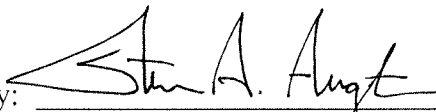
²³ See *United States Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977).

IV. CONCLUSION

Since 1986, the Commission has relied upon market forces to discipline telephone company billing for third party charges. The industry has responded with a voluntary code of billing guidelines that ensure services are knowingly authorized and that enable billing agents to quickly identify and root out companies that violate the prescribed standards of conduct. While not perfect, these guidelines continue to be improved, and have in fact been improved in the past year. ISG urges the Commission to continue to refrain from intruding upon private transactions that for 25 years have been held to be outside the Commission's jurisdiction.

Respectfully submitted,

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